

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Direct )  
Energy Services, LLC for Certification as a ) Case No. 02-1829-GA-CRS  
Competitive Retail Natural Gas Supplier. )

ENTRY

The attorney examiner finds:

- (1) On August 17, 2012, Direct Energy Services, LLC (Direct Energy) filed an application for renewal of its certification as a competitive retail natural gas supplier. On August 23, 2012, Direct Energy filed a motion for a protective order, pursuant to Rule 4901-1-24(D), Ohio Administrative Code (O.A.C.), requesting that exhibits C-4 and C-5 of its application be kept under seal. These exhibits contain financial arrangements (Exhibit C-4) and forecasted financial statements (Exhibit C-5).
- (2) In support of its motion for a protective order, Direct Energy explains that exhibits C-4 and C-5 contain competitively sensitive and highly proprietary business financial information which is not generally known or available to the general public. Therefore, Direct Energy requests that the information found in exhibits C-4 and C-5 be treated as confidential.
- (3) Section 4905.07, Revised Code, provides that all facts and information in the possession of the Commission shall be public, except as provided in Section 149.43, Revised Code, and as consistent with the purposes of Title 49 of the Revised Code. Section 149.43, Revised Code, specifies that the term “public records” excludes information which, under state or federal law, may not be released. The Ohio Supreme Court has clarified that the “state or federal law” exemption is intended to cover trade secrets. *State ex rel. Besser v. Ohio State*, 89 Ohio St. 3d 396, 399, 732 N.E. 2d 373 (2000).
- (4) Similarly, Rule 4901-1-24, Ohio Administrative Code (O.A.C.), allows an attorney examiner to issue an order to protect the confidentiality of information contained in a filed document, “to the extent that state or federal law prohibits release of the information, including where the information is deemed . . . to constitute a trade secret under Ohio law, and where non-

disclosure of the information is not inconsistent with the purposes of Title 49 of the Revised Code.”

- (5) Ohio law defines a trade secret as “information . . . that satisfies both of the following: (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” Section 1333.61(D), Revised Code.
- (6) The attorney examiner has examined the information covered by the motion for protective order filed by Direct Energy, as well as the assertions set forth in the supportive memorandum. Applying the requirements that the information have independent economic value and be the subject of reasonable efforts to maintain its secrecy pursuant to Section 1333.61(D), Revised Code, as well as the six-factor test set forth by the Ohio Supreme Court,<sup>1</sup> the attorney examiner finds that the information contained in exhibits C-4 and C-5 of Direct Energy’s application constitutes trade secret information. Release of these documents is, therefore, prohibited under state law. The attorney examiner also finds that nondisclosure of this information is not inconsistent with the purposes of Title 49 of the Revised Code. Finally, the attorney examiner concludes that this document could not be reasonably redacted to remove the confidential information contained therein. Therefore, the attorney examiner finds that Direct Energy’s motion for protective order is reasonable with regard to exhibits C-4 and C-5 of its application and should be granted.
- (7) Rule 4901-1-24(D)(4), O.A.C., provides for protective orders relating to gas marketers’ certification renewal applications to expire after 24 months. The attorney examiner finds that the 24-month provision in Rule 4901-1-24(D)(4), O.A.C., is intended to synchronize the expiration of protective orders related to gas marketers’ certification applications with the expiration of their certification and that the expiration dates should allow adequate time for consideration of any motion for extension.

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<sup>1</sup> See *State ex-rel. The Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 687 N.E.2d 661 (1997).

Therefore, confidential treatment shall be afforded to exhibits C-4 and C-5 for a period ending 24 months from the effective date of the certificate issued to Direct Energy, or until September 18, 2014. Until that date, the docketing division should maintain, under seal, exhibits C-4 and C-5, which were filed under seal in this docket on August 17, 2012.

- (8) Rule 4901-1-24(F), O.A.C., requires a party wishing to extend a protective order to file an appropriate motion at least 45 days in advance of the expiration date. If Direct Energy wishes to extend this confidential treatment, it should file an appropriate motion at least 45 days in advance of the expiration date. If no such motion to extend confidential treatment is filed, the Commission may release this information without prior notice to Direct Energy.
- (9) As a final matter, the attorney examiner notes that previous confidential documents filed by Direct Energy, which were designated, variously, as exhibits C-3, C-4, C-5, or C-6, were granted protective treatment by the Commission and remain under seal. The filing dates for these confidential documents were August 11, 2010, July 15, 2008, July 14, 2006, August 10, 2004, July 19, 2004, and July 19, 2002. Direct Energy has not requested extensions of the protective orders granted by entries issued October 8, 2010, August 27, 2008, July 28, 2006, September 7, 2004, August 11, 2004, and July 14, 2003, for the confidential exhibits of its 2010, 2008, 2006, 2004, and 2002 applications. Therefore, the attorney examiner directs the Commission's docketing division to release all of these exhibits into the public record.

It is, therefore,

ORDERED, That the motion for protective order filed by Direct Energy be granted with regard to the information contained in exhibits C-4 and C-5 of Direct Energy's 2012 application. It is, further,

ORDERED, That the Commission's docketing division maintain, under seal, the unredacted exhibits C-4 and C-5, which were filed under seal in this docket on August 17, 2012, for a period of 24 months, ending on September 18, 2014. It is, further,

ORDERED, That the Commission's docketing division release into the public record, on October 26, 2012, Direct Energy's previous confidential documents, designated

as exhibits C-3, C-4, C-5, or C-6, that were filed under seal in this docket on August 11, 2010, July 15, 2008, July 14, 2006, August 10, 2004, July 19, 2004, and July 19, 2002. It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Kerry Sheets

By: Kerry K. Sheets  
Attorney Examiner

JRJ/sc

**This foregoing document was electronically filed with the Public Utilities**

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**Case No(s). 02-1829-GA-CRS**

Summary: Attorney Examiner Entry granting a protective order. - electronically filed by Sandra Coffey on behalf of Kerry Sheets, Attorney Examiner, Public Utilities Commission of Ohio